United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original + Affidavit of Mailing

77-1415

To be argued by
STEVEN G. NELSON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1415

UNITED STATES OF AMERICA,

Appellee,

—against—

LUIS A. MENA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

MARY MCGOWAN DAVIS,
STEVEN G. NELSON,
Assistant United States Attorneys
(Of Counsel).

UNITED STATES COURT OF APPEALS
FILED
JAN 25 1978
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1415

UNITED STATES OF AMERICA,

Appellee,

—against—

LUIS A. MENA,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Luis Mena appeals from a judgment of the United States District Court for the Eastern District of New York (Mark A. Costantino, *J.*), entered on September 23, 1977, convicting him, after a jury trial, of one count of possession of cocaine with intent to distribute, and one count of actual distribution of the cocaine, each in violation of Title 21, United States Code, Section 841 (a)(1). Mena was sentenced to imprisonment for concurrent terms of three years with a ten year special parole term. Additionally, Mena was sentenced to deportation at the conclusion of his imprisonment. He is currently serving his sentence.

On appeal Mena presents various claims: *first*, that a directed verdict should have been granted based upon conflicting testimony of Government witnesses; *second*, that the trial court improperly admitted into evidence

certain photographs which did not fairly and accurately depict the scene of the crime; *third*, that the prosecution's questions and statements improperly asserted that the defendant was under an obligation to hire an investigator and produce a missing witness; and *fourth*, that the Government showed bad faith in making it appear that defendant could speak English at the time the crime was committed.

Statement of Facts

A. The Government's Case in Chief

On December 13, 1976, Agent George Papantoniou of the Drug Enforcement Administration had a conversation with a confidential informant (T. 31). As a result of that conversation, Agent Papantoniou and his partner, Agent Robert Sears, conducted a surveillance of Herbeton Street and Richmond Terrace, Staten Island, New York at approximately 11:30 a.m. on December 14, 1976. Both agents testified that during this surveillance an individual, subsequently identified as Luis Mena, drove up in a 1969 green Pontiac bearing New York license number 144DKP, which was then registered to and owned by Luis Mena. Mena spoke to the confidential informant for five to ten minutes and then departed (T. 31-33, 88-89). During this meeting, both individuals were being observed by Agents Sears and Papantoniou from a distance of ten to fifteen yards.

Thereafter, on December 15, 1976, at approximately 5:30 p.m., Agents Sears and Papantoniou received a telephone call from the confidential informant and, on December 16 proceeded to a pre-arranged location in Brooklyn at 6:45 p.m. There they met approximately six other agents who were to conduct a surveillance. Agent Papantoniou searched the confidential informant to ensure that he was carrying no drugs and the two of them then proceeded in

a government vehicle to a pre-arranged location underneath the Brooklyn Queens Expressway between Carlton Avenue and Adelphi Street, Brooklyn, New York (T. 35-36).[1]

At approximately 7:00 p.m., the informant observed a 1969 green Pontiac and motioned its driver to proceed to a point next to the government vehicle (T. 45). The Pontiac pulled up next to the government vehicle and both Papantoniou and the informant entered the back seat of the Pontiac. Agent Papantoniou testified that in the front seat on the driver's side was Luis Mena and in the passenger's seat was an individual identified by Mena as "Carlo" (T. 46). After greetings were exchanged, Mena turned and asked the informant if he had brought the money. The informant replied that Papantoniou had brought the money and wished to see the cocaine. Mena then handed the informant a plastic bag containing a white powdery substance later identified as cocaine. Papantoniou and the informant examined the bag and inquired as to the quality of the cocaine. Mena responded by saying it was very good cocaine (T. 46-48). There ensued a conversation in which the informant advised

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[1] During Agent Papantoniou's testimony, Exhibits 2A through 2F were offered into evidence by the Government to aid the jury's understanding of later testimony relating to the scene of the transaction. These exhibits were identified by Agent Papantoniou as photographs of the area where the transaction in question took place. They were taken in July, 1977, and Agent Papantoniou testified that the photographs depicted the area exactly as it was observed by him on the night of the transaction, with the exception that certain vehicles were not present at both times and a fence had been taken down in the intervening months. Agent Papantoniou identified where the fence had been located and, at the court's instruction, drew in red ink the outline of the fence on Exhibit 2A. The Government offered Exhibits 2A through 2F in evidence and, over defense counsel's objection, they were admitted (T. 36-39). The court also received in evidence Exhibit 3, a chart of the same area (T. 41-42).

Mena that Papantoniou was interested in purchasing large amounts of cocaine in the future—one kilogram amounts. There was a discussion regarding availability and "Carlo" said there was not much cocaine available on the street (T. 51). Papantoniou testified that all conversations in the Pontiac took place in English and that Mena spoke "broken English" (T. 54).

After this conversation, Papantoniou proceeded to the government vehicle, opened the trunk, and removed a brown paper bag containing $4600, the agreed-on price for the cocaine. He then returned to the Pontiac, leaned in the passenger window and handed the money to Mena. Mena gave the cocaine to the informant who exited the Pontiac and returned with Papantoniou to the government vehicle (T. 52-53). They then left to meet with surveillance agents. Papantoniou sealed the cocaine in a plastic evidence bag (Gov't. Ex. 4) and it was later examined and determined to be cocaine hydrochloride (Stipulation—Gov't. Ex. 5, T. 66-69).

Agent Sears testified that, after the government vehicle drove off, he observed the 1969 Pontiac, which was identified as Mena's (Stipulation—Gov't. Ex. 1, T. 32-33), make a right turn and park at the intersection of Adelphi Street and Park Avenue. Mena got out of the Pontiac, had a short conversation with an unidentified individual, reentered his vehicle, and departed the area (T. 91-92, 181). Agent Sears observed Mena exit the vehicle from a distance of approximately twenty yards (T. 92). Mena's vehicle then proceeded, under the surveillance of Agent Robert Ridler, for a distance of a mile or two and stopped at Sixth Avenue and St. John's Place. The passenger entered a residence at 139 Sixth Avenue and the Pontiac departed (T. 182).[2]

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[2] Agent Papantoniou testified that Mena was not arrested on December 16, 1976 because the agents were attempting to negotiate a large subsequent purchase.

In January of 1977, Mena took a trip to Colombia, allegedly to visit his family and to straighten out certain immigration problems (T. 78, 85-86). Papantoniou did not see Mena again until May 13, 1977. On that date, Papantoniou and the confidential informant observed by Agent Sears drove to Mena's place of business and arrived at 11:00 a.m. (T. 94). Papantoniou asked Mena if he could purchase a larger amount of cocaine. Mena replied that he had none available but that he would attempt to find some cocaine because he could use the money. (T. 70). Papantoniou testified that he recognized the defendant as the same man from whom he had purchased the cocaine on December 16, 1976 (T. 71). He stated that this conversation too transpired entirely in English (T. 70).

B. The Defense Case

The defense case consisted of Mena's testimony, the testimony of three character witnesses, and the testimony of two additional witnesses, Messrs. Lamb and Lopez. Mena testified that, although he was driving his Pontiac on the night of December 16, 1976 in the general vicinity of Carlton Avenue and Adelphi Street at approximately 7:00 p.m., he merely dropped "Carlo" near a girlfriend's home, waited for him, and then dropped "Carlo" off at a bus stop at Myrtle Avenue and Adelphi Street (T. 137).[3] Mena further stated that he never met with the informant on December 14, 1976 (T. 137) and never met with Agent Papantoniou on May 13, 1977 (T. 138-39).

The defense sought to demonstrate through the testimony of Lamb and Lopez that Mena did not speak any

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[3] During the Government's rebuttal case, Agent Ridler testified to having seen Mena's vehicle proceed without a stop, not to a bus stop at Myrtle Avenue and Adelphi Street, but to a residence at 139 Sixth Avenue.

English at the time of the alleged transaction, thereby proving that Agent Papantoniou had been lying when he stated that Mena negotiated the sale in English. Mr. Lopez, Mena's supervisor at work, testified that he always spoke to Mena in Spanish, which was the first language for each of them (T. 106). However, on cross-examination, Mr. Lopez conceded that most people at that place of employment spoke Spanish as their first language and he would not know if Mena spoke English or not (T. 110-11).

The defense also called Mr. Lamb, an officer at the bank from which Mena had obtained a loan. Mr. Lamb testified that Mena often brought someone with him to interpret during loan transactions (T. 126-27). However, when asked whether Mena spoke English, Mr. Lamb declared that the defendant spoke broken English (T. 126), just as Agent Papantoniou had stated in his direct testimony.

With regard to Mena's claim that, although present in the general area of the transaction on the night in question, he was not at the exact location specified and did not participate in the alleged sale, this defense was refuted by every piece of credible evidence presented. Agents Papantoniou, Sears and Ridler placed Mena at the scene of the transaction on the night of December 16, 1976. Agent Papantoniou testified that he bought the cocaine from Luis Mena and that it was the same Luis Mena whom he had observed in the surveillance of December 14, 1976 and with whom he later met on May 13, 1977. Agent Sears stated that he saw Mena get out of his car after the sale had been consummated, and Agent Ridler followed Mena's vehicle to a residence at Sixth Avenue and Adelphi Street. Although Mena contended that he never met the informant on December 14 or Papantoniou on May 13, Agents Sears and Papantoniou refuted this through their testimony.

Mena also insisted that he did not know where to locate "Carlo", the only person who could allegedly corroborate his story (T. 138). However, on cross-examination, it was established that Mena had made no attempt at all to find "Carlo" and his explanation that he did not have any way to locate him was shown to be unworthy of belief (T. 151-53, 157-161). Finally, Mena emphasized that he spoke no English whatsoever, but his own witnesses as well as the agents disproved that contention.

Mena's defense proved so improbable that his own attorney during summation, while still insisting on Mena's innocence, nevertheless conceded that perhaps Mena was where he testified he had not been and perhaps he was in the car when the transaction took place (T. 205-206). Having heard the overwhelming Government evidence previously detailed and the dubious testimony elicited from the defendant, the jury returned a verdict of guilty on both counts of the indictment.

ARGUMENT

POINT I

The lower court properly denied Mena's motion for a judgment of acquittal at the close of all the evidence.

Mena asserts that the trial court improperly denied his motion for a judgment of acquittal at the close of all the evidence. At the conclusion of the Government's case in chief, defense counsel moved, pursuant to Rule 29 of the Federal Rules of Criminal Procedure, for a judgment of acquittal (incorrectly denominated a motion for a directed verdict). The trial court denied the motion (T. 109). At the conclusion of the Government's rebuttal case, which consisted of the testimony of Agent Ridler,

defense counsel renewed his motion. Counsel based his motion on the fact that Agents Papantoniou and Sears had testified that, when Mena drove his Pontiac up next to the government vehicle on the night of December 16, 1976, he parked to the left of the government vehicle. However, Agent Ridler testified that Mena's vehicle was located to the right of the government vehicle (T. 180). According to defense counsel, this apparent discrepancy in the testimony of the agents required a judgment of acquittal. The trial court denied defendant's motion (T. 186) and we submit that the ruling was entirely proper.

In the first instance, it is important to note that Mena contended that he was never parked under the Brooklyn-Queens Expressway at all. Therefore, it was immaterial whether he parked to the left or the right of the government vehicle. What was significant was that all three agents placed Mena at a location which he stated he never occupied. Accordingly, the evidence on this issue was overwhelming.

Moreover, even if the exact position of the vehicles had been directly in issue, the fact that witnesses disagreed as to whether Mena's vehicle was to the left or right of the government vehicle created a question of fact which the jury alone could consider and decide. It is well-settled that, on a Rule 29 motion, the trial court is bound to view the Government's evidence in its most favorable light and may not assess the credibility of witnesses, weigh evidence, or draw inferences of fact from the evidence, for these are jury functions. See *United States* v. *Tutino*, 269 F.2d 488 (2d Cir. 1959); see also 2 Wright, *Federal Practice and Procedure*, 467 n.80-81 (1976 Supp.). We submit that the evidence, evaluated in the manner prescribed by Rule 29, proved the defendant's guilt not only beyond a reasonable doubt, but beyond any doubt. Accordingly, it is clear that the trial court's denial of defendant's motion was entirely proper.

POINT II

The lower court properly admitted into evidence photographs of the crime scene which fairly and accurately depicted the area on the night in question.

Mena asserts that the trial court acted improperly in admitting into evidence photographs of the crime scene. This contention is without merit.

During the course of Agent Papantoniou's testimony, the Government sought to introduce into evidence Exhibits 2A through 2F for the purpose of showing the general layout of the crime scene on the night in question. Agent Papantoniou testified that all of the photographs were taken in July, 1977, approximately seven months after the transaction (T. 36). When asked whether they depicted the area exactly as it appeared on the night in question, Agent Papantoniou replied that they did, with the exception that the cars were different and a fence had been taken down in the intervening months (T. 37). Agent Papantoniou said that he could identify where the fence had previously been and, over defense counsel's objection, the court permitted Agent Papantoniou to mark in red ink on Exhibit 2A an outline of the fence (T. 36-38). Agent Papantoniou stated that nothing else in the photos was different than on the night of December 16, 1976 and that the pictures were a fair and accurate representation of the way the area looked on that evening (T. 38-39). The Government offered Exhibits 2A through 2F in evidence, and defense counsel objected, arguing that, because there were some changes, the photographs could not "depict the areas correctly" (T. 39). The trial court responded:

> It need be only a fair representation of the area at the time and it need not be all the same factors involved (T. 39).

We submit that the trial court's ruling was entirely proper.

Mena correctly states that "photographs are relevant if they either assist witnesses in presenting and explaining their testimony or aid the jury in understanding the issues" (Brief at 5). The photographs in question, together with the chart of the area (Gov't. Ex. 3), were offered for both of these purposes. They were essential to the jury's proper understanding of where the transaction took place, where various surveillance agents including Agents Sears and Ridler were located, and to offer perspective as to distance. As to each of these issues, the photographs were probative and valuable.

Moreover, Mena demonstrates absolutely no prejudice resulting from the admission of the photographs. He mentions only that the fence might have interfered with surveillance and that, therefore, these unobstructed pictures may have been misleading. In the first instance, Agent Papantoniou indicated exactly where the fence was located and outlined it in red ink. Obviously, therefore, the jury was alerted to the fence's prior existence. More importantly, all of the testimony relating to surveillance of the vehicles came from agents who were at vantage points *behind* the vehicles. Accordingly, the fence which was *in front* of the vehicles in no way obstructed their view of any of the events to which they testified and Mena's position in this regard is without merit.

Mena also contends that the vehicles were depicted with "X"s on the photographs, and this was somehow misleading. In response, we merely note that no "X"s were ever placed on the photographs. Mena's contention is, therefore, frivolous.

In any event, it is well-settled that the admission of photographs in evidence lies within the discretion of the trial court and its decision will not be disturbed unless

an abuse of discretion is shown. *Frank's Plastering Co.* v. *Koenig*, 341 F.2d 257, 260 (8th Cir. 1965); *Alford* v. *New York Central R.R. Co.*, 339 F.2d 1019, 1021 (7th Cir. 1964); *Jenkins* v. *Associated Transport, Inc.*, 330 F.2d 706, 710 (6th Cir. 1964). Likewise, it is established that, where minor changes appear on photographs taken after the date in issue, they will not render the photographs inadmissible; the photographs may nevertheless constitute a fair and accurate representation of the scene in question and any change in conditions relates only to the weight to be accorded such evidence, not to its admissibility. *United States* v. *Bucon Construction Co.*, 430 F.2d 420, 425 (5th Cir. 1970); *Alford* v. *New York Central R.R. Co.*, *supra*, at 1021; *Barney* v. *Staten Island Rapid Transit R.R. Co.*, 316 F.2d 38, 43 (3d Cir. 1962), *cert. denied*, 375 U.S. 826 (1963).

In the instant case, where the agent testified that, notwithstanding minor changes in conditions, the photographs fairly and accurately represented the crime scene on the night in question, we submit the trial court properly exercised its discretion in admitting them into evidence.

POINT III

It was not error for the Government to comment upon and ask questions regarding the defendant's failure to produce an eyewitness who was equally available to both sides.

Mena asserts that the prosecution acted improperly in questioning him regarding any attempts he may have made to locate the individual named "Carlo" or "Carvol". This individual was, according to Mena's version of the events of the night in question, the only person who could corroborate Mena's contention that he had not taken part in a drug transaction. Mena testified on direct examina-

tion that he had met "Carlo" on two occasions while playing soccer and they then met again on the night in question and went to the general vicinity of the transaction. Mena stated that he never saw "Carlo" again, did not know where he lived, and did not know his full name (T. 138).

During cross-examination of Agents Sears and Papantoniou, defense counsel tried to show that the agents had made no effort to locate "Carlo", the implication being that the Government did not wish to have him testify (T. 75-76, 100). Then the defendant testified on his own behalf and told the somewhat improbable story that he did not really know "Carlo" and did not know where to find him. On cross-examination, the prosecution attempted to attack Mena's credibility and his story, emphasizing, in response to defense counsel's opening statement and cross-examination of Agents Sears and Papantoniou, that at the very least, "Carlo" was equally available to both sides and could have been called by the defense.

Cross-examination of Mena on this point elicited that he had met "Carlo" while playing in a weekly soccer game and that he had met him twice at these games. Mena contended that, although he played in these games once or twice a week, he knew the name of no one in these games, did not know where any lived, and knew no one who knew "Carlo" (T. 152-58). To highlight the doubtful nature of this story, the prosecution then asked Mena whether, after he received a copy of the charges, he thought it was important to contact "Carlo"; whether he attempted to locate "Carlo"; whether he instructed his attorney to attempt to locate "Carlo"; and, finally, whether his lawyer hired an investigator to find "Carlo". The last question was objected to and the trial court instructed the jury as follows:

> The defendant need not do anything. There is no duty on him. (T. 161)

Mena contends that the above-mentioned questions were improper in that they suggested to the jury that the defendant had an obligation to hire an investigator and that he had failed in his obligation to produce "Carlo" as a witness (Brief at 7).

With regard to the obligation of hiring an investigator, we submit that this question was entirely proper and the defendant suffered no prejudice. In the first instance, it is critical to note that the defense initiated the arguments relating to the identity of "Carlo" and the investigation of his whereabouts. As previously stated, Agents Papantoniou and Sears were both cross-examined on their failure to locate "Carlo" before Mena took the stand. (T. 75-76, 100). Moreover, defense counsel sought to take advantage of "Carlo's" absence and himself raised the question of an investigator in his opening statement:

> We don't know where Mr. Carbhol [Carlo] is and we don't have the *investigating staff* tc go out and find this gentleman, Mr. Carbhol. If we could locate him we would bring him in and we could show that Mr. Mena was never involved in any transaction and he doesn't know anything about any transactions. (T. 24) (Emphasis added)

It is clear that counsel was suggesting that "Carlo" could corroborate Mena's story and that only the Government with its investigative resources could locate him. The question to which defendant objects was designed to test the credibility and quality of Mena's story and to show that Mena, the only person who really knew "Carlo", had made no attempt to find him. In light of counsel's opening remarks and the tenor of his cross-examination of Agents Sears and Papantoniou, it is readily apparent that the prosecution's questioning of Mena was entirely proper. Moreover, the defendant did not answer the question posed, and the trial court's immediate curative instruction that the defendant had no obligation to locate Carlo dispelled any erroneous impression which the jury may have derived.

With regard to Mena's assertion that this line of questioning and the quoted remark from the prosecution's summation [4] improperly reflected on the defense's failure to produce "Carlo", we submit that these remarks constituted a legitimate comment upon the case which the defense elected to present to the jury. See *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969), *cert. denied*, 397 U.S. 961 (1970). Moreover, this was a fair and proper response to counsel's implication, on cross-examination and in his opening statement, that the Government had failed to locate and/or produce "Carlo".

As to Mena's claim that the prosecution's summation remarks were improper, it is well-settled that, absent plain error which is clearly not present here, defendant's failure to object is fatal to any claim of error. See *United States* v. *Deutsch*, 451 F.2d 98 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Moreover, as this Court recently stated in *United States* v. *Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976):

> We have repeatedly held that the prosecutor may comment upon the defense's failure to contradict the government's case. *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266, 1268-1270 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). This is particularly proper where contradictory testimony was potentially available from witnesses other than the defendant himself. *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973); *United States* v. *Deutsch*, 451 F.2d 98, 117 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972).

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[4] The prosecutor stated: "Mr. Mena, if you recall to the best of your recollection the testimony, he made virtually no effort to locate this individual even by his version of the facts to get this Carvol to corroborate his testimony. Perhaps, he was just happy not to have him here."

In *Rodriguez*, the defendant did not take the stand. Where, as here, the defendant did testify, the argument advanced by appellant is frivolous.

Mena's contention regarding the prosecution's questioning of Mena as to his illicit relationship with Ms. Santiago is equally specious. In the first instance, such questions were entirely proper in that they related directly to Mena's credibility on certain key issues raised by the defense. Second, the full nature of the illicit relationship had been elicited prior to the questions objected to by Mena. Finally, an objection to the first question was sustained and the second question was withdrawn. Accordingly, it is readily apparent that the defendant suffered no prejudice and the claim of error is without merit.

POINT IV

The Government did not show bad faith in refuting defendant's contention that he spoke no English at the time of the transaction.

Finally, Mena contends that the Government showed bad faith in attempting to establish that Mena spoke English at the time of the transaction. Agent Papantoniou testified that the entire transaction was conducted in English and that Mena spoke "broken English" (T. 54). Mena then took the stand and testified that he spoke no English (T. 141, 147). On cross-examination, the prosecution merely attempted to highlight the inconsistency between the testimony of Mena and that of Agent Papantoniou. This discrepancy was, of course, exacerbated by the defense's own witness, Mr. Lamb, who corroborated Agent Papantoniou's statement that Mena spoke broken English. In doing so Lamb, of course, cast doubt on Mena's credibility. We agree that the testimony of Mr. Lamb and Agent Papantoniou was

prejudicial to Mena's defense, but, we submit, it certainly was in no way improper. The defendant raised the issue and should not be heard to complain when it comes back to haunt him.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
January 23, 1978

Respectfully submitted,

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★ U. S. Government Printing Office 1978— 714—060—169

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 26th day of January 19 78 he served a copy of the within Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Louis A. Tirelli, Esq., 52 S. Main St., Spring Valley, N.Y. 10977

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen

Sworn to before me this
26 day of January 1978

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979